United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2004

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TO BE ARGUED BY
RALPH L. McMURRY

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES ex rel. EDWARD LaBELLE,

Petitioner-Appellant,

-against-

HON. J. EDWIN LAVALLEE, Superintendent, Clinton Correctional Facility,

Respondent-Appellee.

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BRIEF FOR RESPONDENT-APPELLEE

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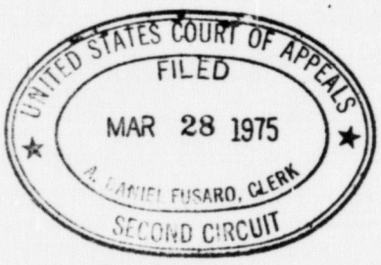

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BRIEF FOR RESPONDENT-APPELLEE

Preliminary Statement

Petitioner-appellant appeals from a decision dated November 16, 1973, of the United States District Court for the Northern District of New York, Port, J., denying petitioner-appellant's application for a writ of habeas corpus. On January 7, 1975, this Court granted a certificate of probable cause and counsel was assigned to represent petitioner.

Questions Presented

1. Whether petitioner's arrest was lawful?

2. Whether the seizure and search of petitioner's car was lawful?

Statement of Facts

Petitioner-appellant ("petitioner") is incarcerated in Clinton Correctional Facility as the result of a conviction in 1970 in Renssalaer County Court, after trial by jury, of murder in the first degree (Dunne, J.). Petitioner was sentenced to life imprisonment on July 7, 1970. The Appellate Division, Third Department, affirmed the conviction (37 A D 2d 135) and the New York Court of Appeals denied leave to appeal on July 28, 1972.

This is petitioner's second appeal to this Court of a denial of a writ of habeas corpus. Petitioner's present conviction is the result of a retrial. Petitioner was originally convicted of murder in the first degree and sentenced to death in 1964. However, in 1968 this Court reversed the conviction and ordered a new trial because of a Bruton violation [Bruton v. United States, 391 U.S. 123 (1968)], United States ex rel. LaBelle v. Mancusi, 404 F. 2d 690 (2d Cir. 1968).

A. The Crime

In the evening of November 28, 1963, fifteen year old Rosemary Snay left her home in Cohoes, New York, to go roller-skating. She never returned. On November 30, 1963, police

found Miss Snay's body face down in a culvert in a rural area of Rensselaer County. Her clothing, was in complete disarray and stained with blood. The head area was coated with blood. An autopsy revealed the cause of death to be fracture of the skull resulting from several severe blows (765). The autopsy also revealed that Miss Snay had been involved in an act of sexual intercourse prior to her death (768).

B. Investigation, Arrest, and Search

On December 2, 1963, one Mary Dolan, age fourteen, reported to the police that she had been assaulted by two men in the Lansingburgh section of Troy on the same evening that Miss Snay had disappeared. At Loudonville State Police Barracks and in the company of her mother, Mary Dolan gave an unsworn statement to the police, which was admitted into evidence at petitioner's trial.

According to Dolan's statement, she was walking home when an old grey car drove past her. One of two occupants of the car called out to her "Hello". Dolan did not answer and continued walking. The car moved on, but returned and came up again behind Dolan. One of the occupants called out, "Hey, come here a minute". Dolan did not answer and continued walking. The man then walked up to her, grabbed her by the collar, and

said "Get in the car". Dolan refused and continued walking. The man returned to the car and continued to follow her. Again the man emerged from the car and grabbed her by the arm, saying "Get in the car, you're going for a ride". Dolan again refused, and began to take evasive action. Dolan pretended to go into one home, and then ran two blocks to a house with its lights on, where she stood. The old grey car continued to pursue Dolan, and parked nearby. Its lights were turned off. Soon the car started up again and drove slowly past Dolan, at which time Dolan took down the vehicle's license number. Several minutes later some of Dolan's friends drove by in a car, and Dolan joined them. They pursued the old grey car that had been following Dolan, and pulled alongside the car at a red light. One of Dolan's friends asked an occupant of the old grey car why had he tried to pick up Dolan. The occupant denied trying to grab Dolan, and when the light changed, drove his car in the direction of the local skating rink.

The police had every reason to believe petitioner was involved in the Dolan incident, contrary to petitioner's claim (Pet. Br. 14). Dolan knew petitioner's identity from Richard Smith, who had been one of Dolan's friends who picked her up in a car when she was being followed. Smith was the one who asked the occupants of the pursuing car why they had tried to pick

her up, and Smith had recognized the driver as petitioner whom he knew previously (388). Dolan did not identify her assailants in her statement because she did not know this information of her own personal knowledge (366, 379, 380). However it is clear that the identification of petitioner as one of Dolan's assailants was communicated to police by Dolan if not by Smith himself prior to petitioner's arrest.

On the basis of Dolan's information, two "John Doe" arrest warrants for assault in the third degree were applied for. An information was prepared by one Detective Leo Barry relying on information communicated to him by a Lt. Brandon who was involved in the taking of Dolan's statement. Dolan's statement itself was not attached to the information. The warrants were issued by a magistrate.

Brandon gave the warrants to Officers Keating and Garrett for execution. At around seven o'clock in the morning of December 3, 1963, petitioner was driving on an inclined icy road in Troy, New York, when the car lost traction and slipped (66). At this point Officers Keating and Garrett, who had been following petitioner in an attempt to execute their warrants,

pulled behind petitioner's car and arrested petitioner for assault. Keating testified that the road conditions were hazardous, that traffic was moderate, and that cars had to move out of lane to avoid petitioner's car, resulting in a "dangerous situation" (68, 69).

Keating received instructions to remain at the scene until another investigator arrived. Officer White arrived five minutes later, with instructions only to render such assistance as was required (105). Officers Keating and Garrett left White at the scene and took their prisoner to the station (106). In the meantime, because of the icy condition of the road, White checked to see if the handbrake of petitioner's car was on (105, 102). As he did so, White noticed what appeared to be bloodstains on the dashboard (103, 106). White called Lt. Brandon who sent a tow truck to the scene. The car was towed away to police facilities, and Brandon issued orders to routinely process the automobile, which meant to inventory and secure the vehicle (154-155).

The search of the car revealed bloodstains in the car of the same blood type as that of Miss Snay (790-791); several hairs of the same type as Miss Snay's; a zipper talon which fit the zipper on Miss Snay's pants; part of a brassiere strap

which fit a missing part of Miss Snay's brassiere; and a dog hair found similar to a dog hair found on Miss Snay's pants.

In the car trunk was found a pinch bar and hatchet both containing blood and hair of the same type as Miss Snay's (789, 793, 794).

The police then obtained a search warrant to search petitioner's home. Here some of petitioner's clothing was recovered containing bloodstains and soil of the same metallic composition as the soil where Miss Snay's body was found. (121-123, 577, 785, 787).

C. State Court Proceedings

Petitioner moved before trial to suppress evidence taken from his car and his home. The trial court denied the motion (Pet. Ex. D). However, the trial court also charged the jury that the arrest warrant and petitioner's arrest were illegal. On appeal, the Appellate Division also considered the warrant to be illegal. 322 N.Y.S. 2d 747, 748 (3rd Dept. 1971). However, the Appellate Division found the arrest to be lawful as one based on probable cause. 322 N.Y.S. 2d at 748.

D. Opinion of District Court

The District Court in denying the application for a writ of habeas corpus adopted the findings and analysis of the Appellate Division. The District Court found that the state court's determination was entitled to the presumption of correctness under the provisions of 28 U.S.C. § 2254(d).

POINT ONE

PETITIONER'S ARREST WAS LAWFUL.

Petitioner argues that his arrest was unlawful, and that accordingly the seizure of his car and its subsequent search was illegal. The arrest is said to be illegal because (1) the arrest warrant was defective and (2) there was no probable cause to arrest petitioner. These arguments are without merit.

At the outset, petitioner is clearly wrong when he claims that the alleged illegality of the arrest is the "law of the case" (Pet. Br. 12). If the illegality of the arrest was the "law of the case" in the trial court, it had obviously ceased to become such on appeal when the Appellate Division found the arrest to be lawful.

A. The arrest was lawful notwithstanding any alleged defective warrant

The Appellate Division's ruling was clearly proper. Assuming arguendo the arrest warrant was illegal, it does not follow that the arrest itself was illegal. The law is clear that an arrest made pursuant to an invalid warrant is nonetheless lawful if supported by probable cause. That was exactly the case here and that was exactly the holding of the Appellate Division. Mayer v. Moeykens, 494 F. 2d 855, 857 (2d Cir. 1974); United States v. Hull, 348 F. 2d 837 (2d Cir. 1965); Chrisman v. Field, 448 F. 2d 175 (9th Cir. 1971), cert. den. 409 U.S. 855; United States v. Wilson, 451 F. 2d 209, 214 (5th Cir. 1971); United States v. Fachini, 466 F. 2d 53 (6th Cir. 1972); United States v. Miles, 458 F. 2d 482 (3rd Cir. 1972).

The Supreme Court of the United States approved this doctrine in Whitely v. Warden, 401 U.S. 560 (1974). There the court, after concluding that an arrest warrant was invalid, looked to see if there was probable cause for arrest independent of the defective warrant. Clearly the identical principle applies to the case at bar, and mandates an inquiry into whether there was probable cause for the arrest independent of

warrant. That there was in fact such independent probable cause cannot be doubted. Point C, infra, p. 15.

B. Section 177 of former New York Code of Criminal Procedure did not render petitioner's arrest illegal

Petitioner next claims that the holding of the Appellate Division was clearly erroneous because under then state law, Code of Criminal Procedure § 177, an arrest for assault in the third degree, which is a misdemeanor, could not be made without a warrant unless the crime was committed in the presence of an officer. Since the assault was not commited in the presence of an officer, it is argued that the arrest was not lawful in the absence of a proper warrant. This argument is without merit.

At the outset it should be noted that this argument was not raised below nor was it argued in the state courts. The only arguments in the state courts went to the validity of the warrant itself, not to the effect of its absence under C.C.P. § 177. (See motion to suppress in trial court and petitioner's brief on appeal). Hence this claim has not been exhausted in the state courts. The state courts must be given a fair and first opportunity to consider the claim, Picard v. Conner, 401 U.S. 273 (1971), and the exact claim raised in the

federal courts must first be presented to the state courts. Approximation is not enough. United States ex rel. Nelson v. Zelker, 465 F. 2d 1121 (2d Cir. 1972), cert. den. 409 U.S. 1045. In a similar case, the United States Supreme Court refused to consider whether a defendant's arrest had met the requirements of § 180 of the former New York Code of Criminal Procedure where the argument was first raised during oral arguments on the appeal. United States v. DiRe, 332 U.S. 581, 587 (1948).

Under the law the Appellate Division's ruling on the lawfulness of the arrest under New York law must be deferred to by this Court. The interpretation of state law is a function of state courts. In Ker v. California, 374 U.S. 23 (1963), the United States Supreme Court deferred to a state appellate ruling upholding the lawfulness of an arrest even though the officers there admittedly did not comply with the terms of a state statute. The state courts are the final expositors of state law. England v. Louisiana Board of Medical Examiners, 375 U.S. 411, 415 (1964). Assuming arguendo the Appellate Division misinterpreted state law, no claim for federal habeas relief would be stated thereby. Schaefer v. Leone, 443 F. 2d 182 (2d Cir. 1971).

The claim fails on the merits. Assuming arguendo a warrant was required for an arrest for the misdemeanor of third degree assault, the police nonetheless could arrest petitioner because there was probable cause to believe he had committed the felonies of assault in the second degree and attempted kidnapping. In such a case the arrest was lawful even though the police labeled the offense for which petitioner was actually arrested as a misdemeanor. The cases clearly upheld the lawfulness of arrests in such circumstances. United States v. Donovan, 485 F. 2d 201 (6th Cir. 1973); United States v. Saunders, 476 F. 2d 5, 7 (5th Cir. 1973); United States v. Smith, 468 F. 2d 381 (3rd Cir. 1972); Klingler v. United States, 409 F. 2d 299, 305-306 (8th Cir. 1969).

Two sister Circuits have applied this principle in situations identical to the case at bar.

In United States v. Bonds, 422 F. 2d 660 (8th Cir. 1970), a warrantless misdemeanor arrest was made in the face of state law which permitted such arrests only if the crime were committed in the presence of the arresting officer. The offense had not been committed in the officers presence. The Eighth Circuit, however, did not consider this dispositive of the issue of the legality of the arrest. The Court said:

> "Under Fourth Amendment theory, however, a reviewing court must make an objective evaluation of the facts and circumstances surrounding the arrest of an individual. See Terry v. Ohio, 392 U.S. 1. Thus, if probable cause exists for the arrest of a person for a felony at the time of the arrest, the search incident to arrest will be upheld if reasonable in scope, although the officer did not accurately name the offense for which the arrest was made." United States v. Bonds, supra, at 664.

On the facts of that case, the Court in Bonds found that the police there had no probable cause to arrest the defendant for a felony. However the principle of Bonds is directly applicable to the case at bar and justifies an inquiry into whether the police had probable cause to arrest petitioner for a felony.

Similarly, in Chaney v. Wainwright, 460 F. 2d 1263 (5th Cir. 1972), the accused was arrested without a warrant for a misdemeanor, damaging telephone equipment. The alleged misdemeanor was not committed in the presence of the arresting officer as required by state law for warrantless misdemeanor arrests. Yet the arrest was upheld by the Fifth Circuit because the officers actually had probable cause to arrest the defendant for possession of burglar tools, a felony.

Applying the principle of Bonds and Chaney to the case at bar, it is clear that the police had probable cause to arrest petitioner for a felony. The forcible attempt of petitioner and his brother to take Mary Dolan "for a ride" was no mere third degree assault. The alarming circumstances surrounding petitioner's repeated attempts to pick her up as described by Mary Dolan, evinced sinister designs by petitioner and his companion and gave police probable cause to arrest petitioner for assault in the second degree* or attempted kidnapping.** Petitioner cannot complain of his arrest for a misdemeanor when he could have been arrested for a felony.

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* Section 242(5) of old Penal Law, assault "with intent to commit a felony".

** Section 1260(1) "...wilfully (1) seizes, confines, inveigles or kidnaps another, with intent to cause him, without authority of law, to be confined or imprisoned within this state ... or in any way held to service or kept or detained against his will."

Section 1250(2) "...leads, takes, entices away, or detains a child under the age of sixteen years, with intent to keep or conceal it from its parents, guardian, or other person having the lawful care or control thereof."

The attempt to commit the crime of kidnapping would of course be a crime. Section 260, old Penal Law.

C. The police had probable cause to arrest petitioner

As an alternative to his arguments revolving around an alleged defective warrant and § 177 of the Code of Criminal Procedure, petitioner argues that the police in any event had no probable cause to arrest him. This argument is totally without merit.

Petitioner claims that at the time of his arrest, Dolan had not identified petitioner as one of the persons who assaulted her and had provided only general descriptions of her assailants and a description of the car in which they were riding. This in incorrect.

The police knew that petitioner was one of the men who tried to pick up Dolan, for the simple reason that Dolan told them. Dolan knew who the assailants were because one of her rescuing companions, Richard Smith, identified them for her. The name "Edward LaBelle" did not appear in Dolan's statement to police simply because she did not know this of her own personal knowledge (366, 379-80). See statement of facts, pp. 3-5, supra. Dolan's description of the car included the license number, found to belong to a car registered to petitioner.

It is clear that the police had very good reason to believe that one of Dolan's assailants was petitioner. Assuming arguendo the police did not know petitioner's identity at this time, this did not vitiate probable cause. Obviously suspects are arrested all the time whose identity is not known beforehand. The "John Doe" procedure in this case was specifically authorized under New York law. Code of Criminal Procedure, § 152. Assuming arguendo the police knew only the license number of petitioner's car, which they did, this in itself would have given probable cause to arrest petitioner. United States v. Ayers, 436 F. 2d 524, 519 (2d Cir. 1970), cert. den. 400 U.S. 842; United States ex rel. Mungo v. LaVallee, 372 F. Supp. 742 (E.D.N.Y., 1974).

Petitioner's argument that there was no probable cause since the arresting officers had no personal knowledge of the assault is frivolous. Assuming arguendo this were true, nothing is proved thereby. It is well settled that probable cause is to be determined by the collective knowledge of law enforcement authorities. That the arresting officer himself has no knowledge constituting probable cause is irrelevant if the collective knowledge of fellow officers is sufficient to constitute probable cause. This only makes sense and is necessary to efficient

law enforcement in modern conditions. This is also the law. United States v. Canieso, 470 F. 2d 1224 (2d Cir. 1972); United States v. Moore, 459 F. 2d 1360 (D.C. Cir. 1972); United States ex rel. Scott v. LaVallee, 379 F. Supp. 111 (S.D.N.Y., 1974).

POINT TWO

THE SEIZURE AND SEARCH OF PETITIONER'S CAR WAS LAWFUL.

Petitioner argues that even if the arrest were lawful, the search of the car could not be justified as incident to the arrest. Petitioner also argues that there was no probable cause to search the car for evidence, contraband or weapons in relation to the third degree assault charge for which petitioner was arrested. Accordingly, it is claimed that the search was unlawful under Chambers v. Maroney, 399 U.S. 42 (1970), and Chimel v. California, 385 U.S. 742 (1969).*

These arguments completely misconceive the issue. The police had independent probable cause to seize and search the car. This probable cause was obtained when Officer White, while properly making sure the car's brake was on, noticed in plain view the bloodstains on the dashboard. This was a clear indication that the car may have been involved in a violent

* Chimel, relied on by petitioner, is not retroactive. Williams v. United States, 401 U.S. 646 (1971).

crime. It was proper at that point to seize the car and take it in. It is well-settled that incriminating evidence inadvertently coming into plain view pursuant to an initial lawful intrusion is subject to seizure. Coolidge v. New Hampshire, 403 U.S. 443, 464-473. (1971) That is exactly the case here.

There can be no doubt that the discovery of the bloodstains in the car was pursuant to a legitimate intrusion.* The car was positioned on an incline on an icy road in the center of the traffic lane. White's checking to see if the brake was on was a simple and necessary safety precaution. White himself had no specific instructions to search the car (105).

In Harris v. United States, 390 U.S. 234 (1968), the Supreme Court upheld a seizure of evidence on a plain view theory applicable to the case at bar. There the police arrested a defendant and impounded his car as evidence. The windows of the car were open and it began to rain. The police opened the door in order to close the window, at which point the registration card of a robbery victim was found in plain view. The

* In this case White's intrusion was proper even assuming arguendo the arrest was unlawful because of a defective warrant. United States v. Cecil, 457 F. 2d 1178 (8th Cir. 1972) (officers at home of suspect pursuant to arrest warrant could seize evidence in open view whether or not arrest warrant was valid).

Court held that the discovery of the card was not the result of a search but of a measure taken to protect the car while in police custody, and that objects falling in the plain view of an officer having the right to be in the position to have that view are subject to seizure. The identical principle applies to the facts of this case.

That the inadvertent discovery of the bloodstains gave the police probable cause to search the car as well as seize it cannot be doubted. To ascertain whether or not probable cause existed, the reviewing court must examine the record as a whole. Whether probable cause exists turns on the facts and circumstances of each case. Terry v. Ohio, 392 U.S. 1. The standard is not hypertechnical but based on common sense. United States v. Wabnik, 444 F. 2d 203 (2d Cir. 1971). Much less evidence will suffice to constitute probable cause for a Fourth Amendment intrusion than to establish guilt. Adams v. Williams, 407 U.S. 143 (1972); United States v. Chaplin, 427 F. 2d 14 (2d Cir. 1970). Moreover, it is well-settled that the test of reasonableness of an intrusion under the Fourth Amendment is different for cars than for stationery areas, given the mobility of cars. Carroll v. United States, 267 U.S. 132, 153 (1925); Preston v. United States, 376 U.S. 364 (1964); Chambers v. Maroney, supra, at 50, n. 8,9; Chimel v. California, supra, at 764, n. 9; Cardwell v. Lewis, 417 U.S. 583 (1974).

The bloodstains were in themselves sufficient probable cause both to seize and to search the car. Certainly there was such probable cause when the bloodstains were viewed in combination with the knowledge already accumulated by the police. That knowledge was considerable and concerned the inextricably interrelated circumstances surrounding both petitioner and his car.

Petitioner claims that the only information known to the police at the time of his arrest for assault making him a suspect in the Snay murder was the knowledge that he and his brother had been in Cohoes, the town near where Miss Snay's body had been found, on the day of the murder (Pet. Br. p. 4). This is incorrect and misleading.

Obviously it was not simply petitioner's presence in the town near where the body was found which made him a suspect. What made petitioner a suspect was the fact that petitioner had forcibly tried to pick up Dolan, another young girl, in the same area of Miss Snay's home and around the same time as Miss Snay's disappearance. It was reasonable to deduce a relationship between these two crimes involving small girls so closely connected in space and time. See United States ex rel. Senk v. Brierly, 381 F. Supp. 447 (M.D. Pa. 1974).

The record also suggests that the police had other evidence linking petitioner to the Snay murder at the time he was arrested for the Dolan assault. While Lt. Bardossi testified at one point that no one had placed petitioner or his vehicle with Miss Snay at the time of the execution of the search warrant affidavit (176, 183), Bardossi also testified that the police by this time had talked to people "who had seen her leave her home and be on the street, when she was last seen alive" (185). One of the individuals who last saw Miss Snay alive on the street in front of her home was a neighbor, a boy named Terrence Huneau, who remembered two men in a 1954 car talking to Miss Snay and asking her if she wanted a ride (399-401).* Although it is not stated precisely when this witness first spoke to police it is highly likely that it was prior to the petitioner's arrest for assault, since an intensive investigation had been going on concerning Miss Snay's last known movements, Huneau stated he talked to the police "a few days later" (420), and the search warrant affidavit was prepared on the evening of December 3, 1963, only a half day after the arrest.

The police by this time also knew that petitioner and his car had been in the "direct neighborhood" of and "one-half block" from Miss Snay's home (182, 186). This information

* At trial Huneau identified one of these men as petitioner.

was the result of interviews with witnesses prior to the execution of the search warrant affidavit, and for the same reasons noted above was probably available to the police prior to petitioner's arrest. Such knowledge pinpointed petitioner or his car much closer to Miss Snay in time and space than petitioner admits (Pet. Br. p. 4).

In addition, police obtained information from another witness Ann Marie Mayville Smith, a friend of Miss Snay, indicating that petitioner and Miss Snay had been acquainted. This information was put in a statement taken December 3, 1963 (State Appeals Exhibits, p. 34), although the record does not indicate at what time the statement was taken or when the witness first talked to police. The statement does allege however that "since the death of Rose Mary Snay, I haven't heard anyone mention any names of persons that might be responsible for this terrible thing", which would suggest the possibility that the petitioner had not yet been arrested when police took this statement.

Finally, the police had every reason to believe that a car had been used in the murder, since the body was found in a rural area. The bloodstains on the car were highly significant since the crime was a particularly bloody one.

Under all these circumstances, it is clear beyond any doubt that the police had probable cause not only to seize petitioner's car but to search it.

The removal of the car to a police garage was reasonable in view of the icy conditions of the road and the car's position on the inclined highway. The Supreme Court in Chambers v. Maroney specifically upheld such removal where safety and other practical considerations are involved:

> "it was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owners convenience and the safety of his car to have the vehicle and the keys together at the station house." Chambers v. Maroney, supra, at 52, n. 10.

The removal of the car was also made necessary by the fact that the evidence could easily have been erased. It is significant that at this point petitioner's brother had not yet been arrested.

It was not necessary to obtain a warrant to search the car, even though petitioner was in custody. This was made clear by the Supreme Court in Chambers v. Maroney:

> "For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under the Fourth Amendment." Chambers v. Maroney, supra, at 52.

Petitioner claims that his arrest on the assault charge was a mere sham and pretext to take him into custody for the murder investigation. This argument is not supported by the evidence.

Keating did say, as petitioner points out, that Brandon told them he wanted to search LaBelle's car for evidence in the Snay murder (97). However petitioner neglects to mention that Keating also denied that Brandon had advised him that the warrant was an excuse to arrest petitioner and search his car (98). Keating also felt this was not the purpose of the warrant (98). Keating also had no prior instructions to search the car upon the arrest (84). Keating did not arrest petitioner as he came out of his house and before he got into his car because they couldn't reach him in time due to several passing cars getting in the way (77).

Similarly, Garrett testified he had instruction to arrest petitioner wherever he was found, and that petitioner was not arrested simply because he was in a car (134). Garrett had no instructions to search the car (135).

Brandon testified that the primary purpose of the arrest of petitioner was not to interrogate him as to the Snay murder, that he gave no instruction to Keating and Garrett to search the car, or even where to execute the warrant (142, 150, 165).

In sum, it is abundantly clear that the arrest of petitioner on the assault charge stands on its own merits.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
March 28, 1974

Respectfully submitted,

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State of New York
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of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

GLORIA KIRNON , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 28th day of March , 1975 , she served the annexed upon the following named person :

Michael Young, Esq.
Legal Aid Society
United States Courthouse - 509
Foley Square
New York, New York 10007

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Gloria Kirnon
GLORIA KIRNON

Sworn to before me this
28th day of March , 1975

Ralph I McMurray
Assistant Attorney General
of the State of New York

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

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GLORIA KIRNON

Sworn to before me this
28th day of March , 1975

Ralph J. McMurray
Assistant Attorney General
of the State of New York